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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

HUGO ISRAEL CAHUEC,  
  
                                Petitioner,  
  
                v.  
  
GREGORY SMITH, et al.,  
  
                                Respondents.

Case No. 3:09-cv-00113-RCJ-RAM

**ORDER**

Before the court are petitioner's corrected motion for leave to file second amended petition (ECF No. 72), respondents' opposition (ECF No. 79), and petitioner's reply (ECF No. 84). The court grants petitioner's motion.

Petitioner seeks to add three new claims. First is a new ground 2(A). Petitioner claims that trial counsel failed to investigate and interview the victim and her father. Second is a new ground 6. Petitioner claims that the prosecution withheld the medical records of the victim and exculpatory statements from her and her family; petitioner thus pleaded guilty without knowing what was in those records. Third is a new ground 7, which is a freestanding claim of actual innocence. Respondents object to the amendment, but they do not persuade the court.

First, respondents argue that the court already has considered and rejected petitioner's actual-innocence claim. The court did hold that petitioner had not demonstrated a fundamental miscarriage of justice that would allow him to bypass the time bar of 28 U.S.C. § 2244(d)(1)(A).

1 ECF No. 49; ECF No. 54. However, since then the court of appeals has vacated the dismissal of  
2 this action to allow the court to consider petitioner's argument for a fundamental miscarriage of  
3 justice in light of the evidence later developed in state court. ECF No. 67. Additionally,  
4 assuming for the moment that a freestanding claim of actual innocence for a person not sentenced  
5 to death actually exists, the standard is different. Carriger v. Stewart, 132 F.3d 463, 476-79 (9th  
6 Cir. 1997).<sup>1</sup> A petitioner seeking to bypass the time bar of § 2244(d)(1) or a state-law procedural  
7 bar through a fundamental miscarriage of justice "must show that in light of all the evidence,  
8 including new evidence, 'it is more likely than not that no reasonable juror would have found  
9 petitioner guilty beyond a reasonable doubt.'" Id. at 478 (quoting Schlup v. Delo, 513 U.S. 298,  
10 327 (1995)). In contrast, a petitioner presenting a freestanding claim of actual innocence requires  
11 affirmative proof of innocence. Carriger, 132 F.3d at 476-77. The court's holding that petitioner  
12 has not demonstrated a fundamental miscarriage of justice no longer is in effect, and that holding  
13 relied upon different evidence and a different standard of review from the freestanding claim of  
14 actual innocence. It is no bar to adding a freestanding claim of actual innocence.

15 Second, respondents argue that petitioner himself disproves the claim in ground 2(A) that  
16 trial counsel failed to interview and investigate the victim and her father, because petitioner states  
17 that the victim's parents would not let current counsel speak with her until 2013. This is an  
18 argument on the merits, and it should be addressed in an answer, if the case comes to that.  
19 Respondents also argue that testimonies of these witnesses at the state-court evidentiary hearing  
20 show that the father's testimony was not helpful and that the victim's testimony was unreliable.  
21 This is an argument against a fundamental miscarriage of justice, which respondents would need  
22 to address in a motion to dismiss.

23 Third, respondents argue that the claims in ground 6 are speculative. The Nevada  
24 Supreme Court did hold that the claim regarding exculpatory statements was speculative. Ex. 99,  
25 at 3-4 (ECF No. 73-42, at 4-5). It also held that the claim regarding medical records were not  
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27 <sup>1</sup> Carriger notes that terminology can be confusing, because both the argument to bypass a procedural bar and  
28 the freestanding claim often are called "actual innocence." 132 F.3d at 477. The court uses the phrase "fundamental  
miscarriage of justice" for the argument to bypass a procedural bar, in the hope of lessening some of that confusion.

1 material. Id. These are arguments on the merits of the claims in ground 6, and respondents  
2 should address them in an answer, if the case comes to that.

3 Fourth, Respondents argue that the actual-innocence claim, ground 7 in the proposed  
4 second amended petition, is not exhausted. See 28 U.S.C. § 2254(b). Respondents argue that to  
5 the extent that petitioner did present an actual-innocence claim, it was for the purpose of  
6 demonstrating a miscarriage of justice. ECF No. 79, at 5-6. Other than citations to exhibits,  
7 ground 7 in the most recent state post-conviction habeas corpus petition, Ex. 58, at 38-39 (ECF  
8 No. 73, at 39-40), and ground 7 of the proposed second amended petition, ECF No. 72-1, at 40-  
9 42, are identical. Petitioner did not argue in ground 7 of the state petition that actual innocence  
10 excuses state-law procedural bars. Petitioner argued in ground 7 of the state petition that the state  
11 district court should grant the writ because he is actually innocent. Petitioner did present a  
12 freestanding actual innocence claim to the state district court.

13 Fifth, respondents argue that the ground is not exhausted because petitioner failed to  
14 appeal the denial of the claim. Petitioner filed in state district court a post-conviction habeas  
15 corpus petition that included a freestanding claim of actual innocence. Ex. 58, at 38-39 (ECF No.  
16 73, at 39-40). The state district court ruled that multiple state procedural bars applied and that  
17 petitioner had not demonstrated a fundamental miscarriage of justice to bypass those procedural  
18 bars. Ex. 117 (ECF No. 74-5). Petitioner appealed. He argued that the state district court erred  
19 in dismissing the petition as procedurally barred and that the Nevada Supreme Court should  
20 remand the case to the state district court for a decision on the merits of all grounds. Ex. 122  
21 (ECF No. 74-11). The Nevada Supreme Court affirmed the state district court's dismissal of the  
22 petition as procedurally barred. Ex. 128 (ECF No. 74-17).

23 Respondents do not persuade the court with their novel argument. This court always has  
24 considered the state courts' application of a state-law procedural bar to a ground to mean that the  
25 ground is exhausted but procedurally defaulted. In an appeal from the denial of a state petition as  
26 procedurally barred, petitioner does not need to argue both that the procedural bar was erroneous  
27 and the merits of the procedurally barred grounds. An argument on the merits would be mere  
28 surplus. If the Nevada Supreme Court ruled that the procedural bar was not erroneous, then it

1 never would reach the merits of the procedurally barred grounds. To the best of this court's  
2 knowledge, when the Nevada Supreme Court has found that the procedural bar was erroneous, it  
3 does not then dismiss the appeal because the appellant failed to argue the merits of his claims on  
4 appeal. Instead, the Nevada Supreme Court remands to the state district court for consideration of  
5 the merits of the claims.

6 Finally, respondents argue that they would be prejudiced by addition of a freestanding  
7 claim of actual innocence. They state, "Cahuec's presentation of a freestanding claim of actual  
8 innocence is unanticipated, particularly based upon the evidence adduced in state court." ECF  
9 No. 79, at 7. As noted above, ground 7 of the federal second amended petition is identical to  
10 ground 7 of the state petition. The freestanding claim of actual innocence is far from  
11 unanticipated.

12 Regardless of what grounds are in the operative petition, the court will need to evaluate  
13 whether petitioner can demonstrate a fundamental miscarriage of justice to bypass the time bar of  
14 28 U.S.C. § 2244(d)(1) and the state-law procedural defaults. If petitioner can demonstrate a  
15 fundamental miscarriage of justice, then the grounds he seeks to add are exhausted, and no other  
16 procedural bars stop the court from considering the additional grounds on their merits. If  
17 petitioner cannot demonstrate a fundamental miscarriage of justice, then the court will dismiss the  
18 action regardless of what grounds petitioner has raised. For these and the above-stated reasons,  
19 the court will grant petitioner's motion for leave to amend.

20 Petitioner also has filed a motion for leave to file supplemental brief in opposition to  
21 motion to dismiss (ECF No. 70). This motion is moot because the court is granting petitioner  
22 leave to amend the petition. Respondents may file a new motion to dismiss the second amended  
23 petition, and thus supplemental briefing is unnecessary.

24 IT THEREFORE IS ORDERED that petitioner's motion for leave to file supplemental  
25 brief in opposition to motion to dismiss (ECF No. 70) is **DENIED** as moot.

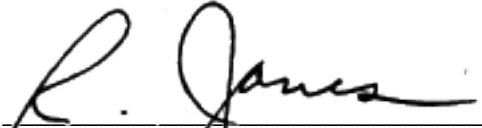
26 IT FURTHER IS ORDERED that petitioner's corrected motion for leave to file second  
27 amended petition (ECF No. 72) is **GRANTED**. The clerk of the court shall file the second  
28 amended petition, currently in the docket at ECF No. 72-1.

1 IT THEREFORE IS ORDERED that respondents will have forty-five (45) days from the  
2 date of entry of this order to answer or otherwise respond to the second amended petition.

3 IT FURTHER IS ORDERED that if respondents file and serve an answer, then they must  
4 comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District  
5 Courts. Petitioner then will have forty-five (45) days from the date on which the answer is served  
6 to file a reply.

7 IT FURTHER IS ORDERED that if respondents file and serve a motion, then petitioner  
8 will have forty-five (45) days from the date of service of the motion to file a response to the  
9 motion. Respondents then will have twenty-one (21) days from the date of service of the  
10 response to file a reply.

11 DATED: March 29, 2019.

  
ROBERT C. JONES  
United States District Judge